

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petitions | : | |
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| of | : | |
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| ROCKWELLS RESTAURANT CORP. | : | DETERMINATION |
| | : | DTA NOS. 820114 |
| for Revision of Determinations or for Refund | : | AND 820314 |
| of Sales and Use Taxes under Articles 28 and 29 | : | |
| of the Tax Law for the Period September 1, 2003 | : | |
| through February 29, 2004. | : | |

Petitioner, Rockwells Restaurant Corp., 97 Brookby Road, Scarsdale, New York 10583, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2003 through February 29, 2004.

On August 19, 2005 and September 1, 2005, respectively, petitioner, Rockwells Restaurant Corp., by its president, Stephen Robins, and the Division of Taxation by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel) waived a hearing and agreed to submit this case for determination, with all documents and briefs to be submitted by the parties by December 12, 2005, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner has established any facts or circumstances warranting the reduction or abatement of penalties and interest imposed herein.

FINDINGS OF FACT

1. On April 30, 2004, the Division of Taxation (“Division”) issued to petitioner, Rockwells Restaurant Corp, a Notice and Demand for Payment of Tax Due (Assessment ID Number L-023732577-9) seeking payment of \$17,600.80 in sales and use taxes due, plus penalty and interest, for the quarterly period ended November 30, 2003.

2. Petitioner’s quarterly return (Form ST-810) for the period ended November 30, 2003 reported \$50,690.71 in tax liability, \$33,089.91 in payments, and \$17,600.80 in tax due.

3. Petitioner’s return was due on December 20, 2003. It was filed on or about April 7, 2004.

4. Petitioner concedes liability for the tax as asserted due in the April 30, 2004 Notice and Demand and concedes that such liability was not paid with the return.

5. On July 23, 2004 the Division issued to petitioner a Notice and Demand for Payment of Tax Due (Assessment ID Number L-024279360-7) seeking payment of \$15,654.17 in sales and use taxes due, plus penalty and interest, for the quarterly period ended February 29, 2004.

6. Petitioner’s part-quarterly return (Form ST-809) for December 2003 reported sales tax due of \$15,654.17.

7. Petitioner concedes liability for the tax as asserted due in the July 23, 2004 Notice and Demand and concedes that such liability was not paid with the return.

8. Petitioner’s liability in this matter results from its failure to remit sales tax collected on taxable sales.

SUMMARY OF PETITIONER’S POSITION

9. Petitioner asserts that reasonable cause exists for the abatement of penalty and interest imposed herein because of certain actions of the Division. Petitioner contends that such actions

resulted in its “inability to effectively operate, borrow funds or sell any of the business’s assets at or near market value in order to meet their financial liabilities and obligations.” The actions by the Division thus “led to the taxpayer’s inability to stay current in its debt including the timely payment of sales tax for the periods [at issue] and the periods leading up to this time and survive while remaining in business.”

10. Among the Division actions complained of by petitioner is an asserted refusal by the Division, in 1999, to agree to a deferred payment arrangement with respect to certain of petitioner’s 1998 and 1999 sales tax liabilities.¹ Petitioner argues that such refusal was improper and led to the issuance of a warrant which hurt petitioner’s business in various ways.

11. Petitioner also complains that certain actions by the Division constituted a “continued abuse of power.” Specifically, petitioner cites the Division’s refusal, at a conciliation conference on July 11, 2001, to waive penalty with respect to sales tax owed for the period ended August 31, 2000; its commencement of a sales tax audit of petitioner in August 2001; and its issuance of numerous collection notices to petitioner for assessments (for periods prior to those at issue herein) which it purports had been properly petitioned to the Division of Tax Appeals.

12. Finally, petitioner contends that the Division failed to act expeditiously with respect to an application under the Division’s tax amnesty program with respect to periods in 1999, 2000, and 2001. Petitioner claims that it applied for amnesty on January 31, 2003 and that its application was approved on July 26, 2004. Petitioner complains that interest continued to accrue during the pendency of its application.

¹ Petitioner provides little information regarding the origin of its sales tax problems, noting only that “during 1998 the Corporation fell behind in its sales tax payments, checks that were sent for sales tax were returned unpaid.” Petitioner asserts that its president was unaware of the situation until contacted by the Division in 1999.

CONCLUSIONS OF LAW

A. Petitioner has failed to establish any cause for its delinquency in the timely payment of taxes for the periods at issue which would appear to a person of ordinary prudence and intelligence as reasonable cause for the delay in filing a sales tax return and paying the tax imposed under Articles 28 and 29 of the Tax Law (*see*, 20 NYCRR 2392.1[d][5]). Accordingly, penalties and interest imposed herein are properly sustained.

Even accepting the factual assertions noted in paragraphs “9” through “12,” such claims do not establish reasonable cause for petitioner’s failure to timely pay sales taxes for the periods at issue. All of the excuses proffered by petitioner as reasonable cause for its failure relate to actions taken by the Division with respect to sales tax periods in 1998, 1999, 2000 and 2001. The instant matter involves petitioner’s failure to timely remit sales tax due for the period September 1, 2003 through February 29, 2004. Petitioner’s excuses do not justify its failure to timely remit payment of sales tax collected during the periods at issue.

Additionally, it is noted that petitioner’s excuses for its failure to timely remit taxes are, essentially, that economic difficulties prevented timely payment. It is well established, however, that economic difficulties do not excuse a failure to pay taxes (*see, Matter of Zeitman*, Tax Appeals Tribunal, January 25, 1996; *Matter of Dworkin Construction Co.*, Tax Appeals Tribunal, August 4, 1988).

Finally, it is noted that petitioner has failed to establish the factual assertions, noted in paragraphs “9” through “12,” upon which its claim of reasonable cause rests. The probative value of such assertions depends largely upon the credibility of the individual making the claims. Petitioner sought to establish these factual assertions by the affidavit of its president, Stephen

Robins. Absent an opportunity to assess the credibility of Mr. Robins, however, the affidavit is insufficient to establish many of the facts asserted therein.

B. The petitions of Rockwells Restaurant Corp. are hereby denied and the notices and demands for payment of tax due dated April 30, 2004 and July 23, 2004 are sustained.

DATED: Troy, New York
April 13, 2006

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE